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In The

Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA,
Petitioner,

v.

PHILLIP PARADISE, JR., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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Supreme Court Rule No. 36 1

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INTEREST OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of petitioner. Consent to the filing of this brief has been granted by counsel for all parties. The letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California

for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation has participated in several cases which involved issues similar to that presented in this matter. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in light of the erroneous holding of the Eleventh Circuit Court of Appeals in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 767 F.2d 1514 (11th Cir. 1985).

STATEMENT OF THE CASE

This case presents the issue of whether the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution tolerate race preference in the form of a one-black-for-one-white promotion quota.

This suit was originally brought by the National Association for the Advancement of Colored People in 1972 against the Alabama Department of Public Safety alleging discrimination in hiring against blacks who sought jobs as state troopers. Based on its finding of intentional hiring discrimination, the District Court issued an injunction ordering the department to hire one black trooper for each white trooper hired until blacks comprised 25% of the state trooper force. In 1975, the District Court made a finding that the state had artificially restricted the size of the trooper force in order to frustrate the court's 1972 order. An injunction was issued prohibiting the department from frustrating the hiring quota.

A consent decree was then entered in 1979. Settling other issues as well, the consent decree required the state to develop fair promotion procedures that were racially neutral and when used for either screening or ranking would have little or no adverse impact on blacks. The promotion procedures were to conform to the 1978 Uniform Guidelines on Employee Selection Procedures.

After two years, the department moved for the approval of a written examination for promoting corporals. This examination had not been validated in accordance with the standards set forth in the Uniform Guidelines of Employee Selection Procedures as required in the consent decree. The United States took the position that the procedures had an adverse impact on blacks, that is, the passage rate for blacks was less than 80% of the passage rate for whites. However, in a second consent decree, the

parties agreed that the examination would be given and scored. Based on the scores and other factors, the applicants would be ranked on a promotion register. The selection procedure would then be examined for possible adverse impact on blacks. If the parties could not agree on an appropriate promotion procedure, the matter would be submitted to the court for resolution.

Two hundred sixty-two applicants took the October, 1981, written examination, of whom sixty were blacks. Only 5 blacks were ranked among the top half and the highest rank was number 80. The United States again took the position that the promotion procedure had an adverse impact on blacks. Based on this finding of adverse impact and because the department was still without acceptable promotion procedures, but without a finding of intentional discrimination, the District Court "enforced" the consent decree by requiring a one-black-for-one-white promotion quota until blacks held 25% of the positions in each of the promotional ranks or until another promotion plan was approved by the court. This order was affirmed by the Court of Appeals even though there were no "finding[s] of discrimination in promotions, and, perforce, no specific victims of promotion discrimination have been identified." *Paradise,* 767 F.2d at 1527. *See also* 767 F.2d at 1530.

The petitioner argued below that the imposition of a one-black-for-one-white promotion quota was a violation of the Fourteenth and Fifth Amendments. Affirming the District Court, the Court of Appeals held that promotion quotas did not violate the Constitution. It used the standard that "if: (1) the governmental authority has authority to pass such legislation; (2) adequate findings have

been made to ensure that the legislation is remedying the present effects of past discrimination; and (3) the use of the classifications extends no further than the demonstrated need of remedying the present effects of the past discrimination," *id.* at 1531, then the use of racial classification will be upheld. In effect, the Court of Appeals balanced the need to redress past discrimination against the need that the remedy be " 'narrowly tailored' to the legislative goals so as to not unfairly impinge upon the rights of third parties." *Id.*

Applying this standard, the Court of Appeals affirmed the promotion quota. The court found: (1) that the promotion quota "is substantially related to the objective of eradicating the present effects of past discrimination, and extends no further than necessary to accomplish the objective," *id.* at 1532-33, (2) the quota is a temporary measure, *id.* at 1533, and (3) the quota "does not require the discharge or demotion of a white trooper or the replacement of a white trooper with a black trooper. Moreover, only qualified black troopers may be promoted . . . and white troopers are not barred by it from advancement . . . ." *Id.*

SUMMARY OF ARGUMENT

The judicially imposed promotion quota grants racial preference to minorities and violates nonminorities' rights to equal protection of the laws under the Fourteenth and Fifth Amendments.

This Court has never approved the explicit use of race as a "remedy" in the absence of "judicial, administrative, or legislative findings of constitutional or statutory violations." *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (Powell, J., concurring). In this case there was no finding by the District Court, or anyone else, that intentional discrimination took place in promotions. Nor was the court's adoption of the promotion quota designed or intended to remedy identified discrimination; rather, it was designed solely to propel blacks into the upper ranks. Only a finding of racially based discrimination can support a race-conscious remedy such as this. Absent such a finding, nonminorities' constitutional rights to be treated as individuals are at stake.

Because there is no finding of intentional discrimination in promotion, the promotion quota invoked below must stand or fall on its own merits or lack thereof. The only evidence presented was the finding of discrimination at the hiring level. The promotion quota cannot withstand an examination under the strict scrutiny test, the test relevant in determining the validity of discrimination based on race.

Absent a finding of racially based discrimination, a government imposed racial preference is clearly an arbitrary and capricious act and itself constitutes invidious discrimination. The Fifth and Fourteenth Amendments protect individual rights and do not countenance group preference merely to obtain racial balance. For these reasons, the judgment below must be reversed.

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ARGUMENT

I

THE FOURTEENTH AMENDMENT FORBIDS THE ADOPTION OF EXPLICIT RACIAL CLASSIFICATION ABSENT ADEQUATE FINDINGS OF PAST DISCRIMINATION

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction, the equal protection of the laws."[1] The Equal Protection Clause does not mention any of the characteristics that divide a nation, such as race, religion, or national origin. It sees only "person[s]" and guarantees to every "person" the "equal" protection of the laws.

This Court has traditionally renounced distinctions between citizens solely because of their ancestry. In one of this Court's most famous dissents, Justice Harlan wrote in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896):

> "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect to civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

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1 Through the Due Process Clause of the Fifth Amendment, equal protection safeguards analogous to those of the Fourteenth Amendment are applicable to actions of the federal government and its agencies, including the judicial order before the Court, and prohibits the federal government from discriminating between individuals or groups. *Fullilove v. Klutznick*, 448 U.S. at 496 (Powell, J., concurring); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Recently this Court in *Wygant v. Jackson Board of Education,* — U.S. —, 54 U.S.L.W. 4479, 4481 (Mar. 20, 1986), stated: "This Court has 'consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality."'" Quoting *Loving v. Virginia,* 388 U.S. 1, 11 (1967), which quoted *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943).

A. Strict Scrutiny Is the Appropriate Standard of Review for Race-Conscious Affirmative Action Plans

Amicus believes that all remedies based on a racial classification are subject to the most searching examination. This standard has been traditionally used when examining "suspect" classifications based on race or national origin. Such classifications are permissible only if they are necessary to promote a compelling interest of the government and only if there is a judicial finding that the use of the classification is so important as to outweigh the basic values of the Fourteenth Amendment.

The decision in *Korematsu v. United States of America,* 323 U.S. 214 (1944), was the start of equal protection constitutional analysis. In that case, the Court upheld, by a six to three vote, the wartime restrictions on residents of Japanese origin but indicated that classifications based on race or national origin would not be consistent with the principles of the Fourteenth Amendment absent compelling governmental interest. This opinion established the basis for the standard of review of classifications based on race:

> "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to

> say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." *Korematsu,* 323 U.S. at 216.

This Court has not swayed from this standard of review when confronted with a classification based on race. In *Wygant* this Court stated "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant,* 54 U.S.L.W. at 4481, quoting *Regents of the University of California v. Bakke,* 438 U.S. 265, 291 (1978) (opinion of Powell, J., joined by White, J.).

In this case, the court below erred in applying a lesser standard of review to a race-based classification. It adopted the standard that "if: (1) the governmental authority has authority to pass such legislation; (2) adequate findings have been made to ensure that the legislation is remedying the present effects of past discrimination; and (3) the use of the classifications extends no further than the demonstrated need of remedying the present effects of the past discrimination" reverse racial classifications will be upheld. *Paradise,* 767 F.2d at 1531. The court should then "balance the legitimate objective of redressing past discrimination with the concerns that the chosen means be 'narrowly tailored' to the legislative goals so as to not unfairly impinge upon the rights of third parties." *Id.*

Clearly, the one-black-for-one-white promotion quota here operates against nonminorities and in favor of blacks. It therefore constitutes a classification based on race and "'must necessarily receive a most searching examination to make sure that it does not conflict with constitutional

guarantees,' " *Wygant,* 54 U.S.L.W. at 4481, quoting *Fullilove v. Klutznick,* 448 U.S. at 491 (opinion of Burger, C.J.).

There are two prongs of the "strict scrutiny" test: "First, any racial classification 'must be justified by a compelling governmental interest.' " *Id.* at 4481, quoting *Palmore v. Sidoti,* 466 U.S. 429, 432 (1984). "Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' " *Id.* at 4481, quoting *Fullilove,* 448 U.S. at 480.

For the promotion quota to be valid in this case, it must satisfy both prongs of the "strict scrutiny" test. This it cannot do.

II

WITHOUT EVIDENCE OF INTENTIONAL DISCRIMINATION THERE IS NO COMPELLING GOVERNMENTAL INTEREST TO JUSTIFY A RACE-CONSCIOUS PLAN

The Court of Appeals, relying on the reasoning and language of the District Court's opinion, held that the purpose of the promotion quota was to provide "an impetus to promote blacks" into the upper ranks. 767 F.2d at 1520. The District Court stated that quota relief was necessary and reasonable "because the history of this case made it clear that the 'intolerable' and 'egregious' *racial disparities* in the upper ranks of the Department would not be eradicated absent 'immediate, affirmative, race-conscious action.' " *Paradise,* 767 F.2d at 1524 (emphasis added).

Racial disparities alone are never sufficient to justify a racial classification. *Janowiak v. Corporate City of South Bend,* 750 F.2d 557 (7th Cir. 1984). As this Court stated in *Wygant,* "the Court has insisted upon some showing of

prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." 54 U.S.L.W. at 4481.

Yet the lower court based its decision to order promotion quotas on the statistical disparity existing between the percentage of black and white state troopers in the upper ranks:

> "On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 lieutenants, *there is still not one black.* Of the 65 sergeants, *there is still not one black.* And of the 66 corporals, *only four are black.*" *Paradise,* 767 F.2d at 1524 (emphasis in original).

These statistics offered by the court to justify this race-conscious promotion quota are of questionable validity since they explain only that there are no blacks in the upper ranks. They do not show discrimination.

No act of racial discrimination was alleged nor were there identified victims. While examples of individual discrimination are not always required, the lack of such proof reinforces the doubt arising from questions about the validity of the statistical evidence. The promotion quota ordered was clearly premised on the court's belief that the department was not doing enough to place blacks in the upper ranks. Discrimination in hiring, and the fact that its effect is felt at all levels, does not produce the necessary findings

of intentional discrimination in promotion. Absent a finding of past discrimination, the lower court cannot satisfy the first prong of the constitutional test that requires it to articulate a compelling governmental interest underlying the promotion quota. It is absolutely necessary that the lower court proffer something more than a showing of statistical disparity to prove past discrimination. It did not do so and therefore the race-conscious remedy adopted by the District Court is unconstitutional.

III

RACIAL PREFERENCE THAT SINGLES OUT NONMINORITY TROOPERS BURDENS INNOCENT PARTIES

The court's order, in its attempt to eliminate the effects of past discrimination in hiring by ordering promotion quotas without a showing of promotion discrimination, is itself discriminating on the basis of race. The absence of such evidence invalidates the promotion quota and therefore fails to justify the adverse impact on the interests of nonminorities. This Court has stated that burdens assigned to innocent third parties by such racial classifications are permissible only when "effectuating a limited and properly tailored remedy to cure the effects of prior discrimination . . . ." *Fullilove,* 448 U.S. at 484.

Employees in any organization look forward to promotions to increase their status and wages. Employees in the state trooper force are no different. Being passed over for promotions may create adverse financial as well as psychological effects on these workers who have invested years in the job. Promotion quotas, like the layoffs in *Wygant,* "disrupt these settled expectations in a way that general hiring goals do not." *Wygant,* 54 U.S.L.W. at 4484.

The fatal flaw in too many affirmative action plans is the promotion of class privileges at the expense of individual rights. In this case the Court has declared that a person's race is more important than his or her individual actions or merits. This Court held in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948): "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

This Court has also declared: "It is the individual . . . who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers." *Mitchell v. United States of America*, 313 U.S. 80, 97 (1941).

This is the view that must be taken of the Fourteenth Amendment, for discrimination is always personal and individual to the person who suffers it. It is of no consolation to that person to know that his or her race as a whole may or may not have been subject to deprivations at other times in other places. What the individual of any race demands and deserves is equal protection from discrimination. Otherwise, a person's race becomes more important than individual actions or merits.

IV

LESS BURDENSOME REMEDIES ARE AVAILABLE

A race-conscious remedy neither compensates victims nor punishes wrongdoers, but instead creates burdens and privileges based solely on skin color. It can only be justified

if it makes whole actual victims of discrimination. *Bakke*, 438 U.S. at 301; *Fullilove*, 448 U.S. at 482.[2] In *Fullilove*, one justice stated, "[e]xcept to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." *Id.* at 530 n.12 (Stewart, J., dissenting).

Quotas do not redress the full effect of discrimination. The restoration of all identifiable victims of discrimination to their rightful places in the trooper rank will remedy to the fullest extent possible all of the effects of the employer's discrimination. There is nothing remedial about preferring an individual whose personal constitutional right to nondiscriminatory treatment has in no way been infringed solely because that individual is a member of the same racial group as others who were so victimized. And accordingly, giving such preferential treatment to persons who have no claim to a "rightful place" in the employer's work force necessarily deprives innocent third parties of their "rightful place." Therefore, promotion quotas serve neither a preventative nor compensatory function and such racially conscious remedies do not further any purpose of the Equal Protection Clause. If there are identifiable victims of promotion discrimination, then this Court should remand this case to the District Court to fashion a remedy to make these victims whole.

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2 It is interesting to note that this promotion quota is limited to blacks. It does not include Orientals, American Indians, or persons of Hispanic descent.

CONCLUSION

When the government distributes benefits under a race-conscious quota, it rejects the concern for the individual that forms the basis for a free society. Such quotas make members of favored classes eligible for preferential treatment regardless of whether they personally have been disadvantaged by race discrimination; at the same time quotas in their arbitrariness exclude others who may have been subject to equally onerous burdens.

The replacement of individual rights and opportunities by a program based on race-conscious quotas is inconsistent with a society dedicated to equal opportunity. Amicus, Pacific Legal Foundation, therefore urges that the decision of the Eleventh Circuit be reversed.

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